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IN THE

Supreme Court of the United States.

No. [illegible] (Oct.)

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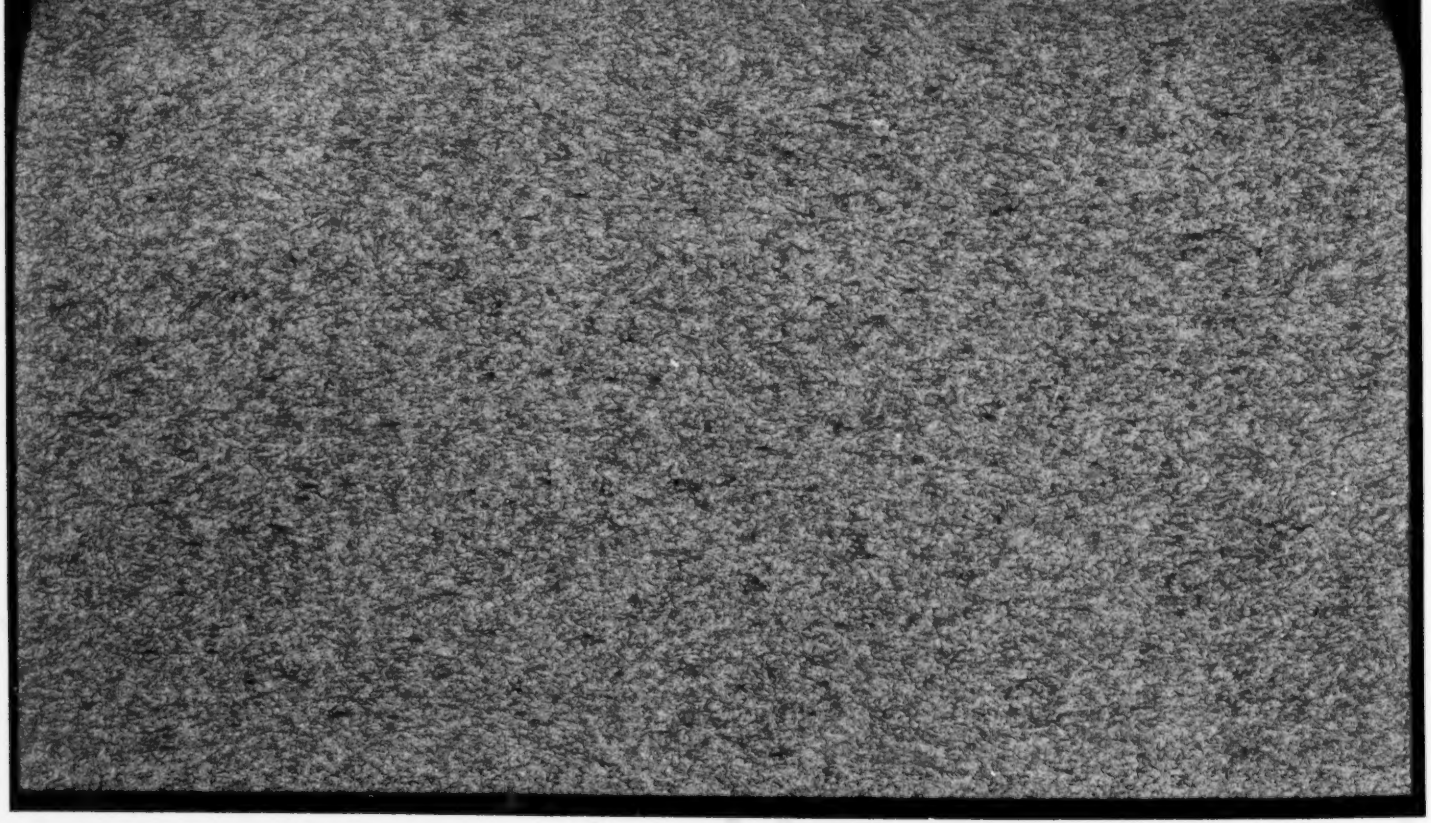
BRIEF OF PLAINTIFF IN ERROR ON MOTION TO DISMISS OR AFFIRM



IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1903.

No. 336.

CHICAGO, INDIANAPOLIS & LOUISVILLE RAILWAY COMPANY,
Plaintiff in Error,

vs.

PATRICK McGUIRE et al.,
Defendants in Error.

BRIEF OF PLAINTIFF IN ERROR ON MOTION TO DISMISS OR AFFIRM.

THE APPEAL SHOULD NOT BE DISMISSED. THERE IS JURISDICTION. ENOUGH OF THE RECORD IS NOT PRINTED.

We have carefully gone over the suggestions of the learned counsel for defendants in error, in support of their motion for a dismissal or affirmance of this cause. We are not able to agree with his conclusion that the only possible effect of suing out the writ of error is delay, but we do contend that there is here involved a federal question; that it has been decided, and that in this decision is error.

Unfortunately, defendants in error have entirely failed to print that part of the record which does present the question.

The evidence shows that plaintiff and defendants in error claimed title to the real estate in controversy through the Louisville, New Albany & Chicago Railway Company. Plaintiff claimed through a mortgage executed by that company, a decree of foreclosure thereof, entered in the Circuit Court of the United States for Indiana; a sale thereunder, and a subsequent deed from the special master and receiver, executed on order of said court. Defendants claimed under an execution sale, and deed thereon, on a judgment against said company. The descriptions in the decree of the court were substantially the same as in the mortgages. These mortgages, and especially one executed in 1890 (before the date of the judgment through which defendants claim), purported to convey all property then owned or thereafter acquired. The material parts of this description are as follows:

> "*All the present and in the future to be acquired railway system and property of the said party of the first part, of every kind and nature*, and however owned, held, leased or enjoyed, together with all the equipment, appurtenances and franchises now owned or at any time hereafter to be acquired by it, more particularly described as follows: * * * (here follows an enumeration in a general way of the property now owned, and as a part of this particular description is the following) * * * and all that it may in the future add, construct or acquire, for the purposes of and connected with or appertaining to the railroads or railways above mentioned and described * * * (then follows a specific enumeration or other items of property, the conclusion of this description being as follows) * * * *it being intended, and hereby expressly covenanted, that the lien of this indenture shall embrace and bind all railroads, real and personal property, choses in action*, contract rights and franchises *which the railway company now owns, or at any time hereafter may*

own, as fully, and to the same extent as if all such property were now in existence and owned by the said railway company, and were specifically described herein and conveyed hereby."

This description, as here set out, is taken from the decree of foreclosure in the Circuit Court of the United States, as shown in the original transcript filed in the office of the clerk of the Appellate Court of Indiana. (See said record, pp. 206, l. 6 to 11, and pages following, and pp. 209, l. 11 to 18.)

The court, in its decree, ordered all of said mortgaged property, including all property "conveyed thereby, and upon which said mortgage is a lien" be sold to pay the debt secured thereby. (See said transcript, pp. 218, l. 2 to 26.)

A special master was appointed to conduct the sale, and convey the property to the purchaser. The receiver of the property was also directed to convey all property in his hands to the purchaser, (pp. 228, l. 3 to 25).

The special master reported sale to the grantors of the plaintiff in error, with deed, and the sale was approved by the court. (P. 236, l. 18 to 237, l. 5.)

In the deed thus approved the special master conveyed to the purchasers:

> "All the railway system and property of every kind and nature, formerly of the Louisville, New Albany and Chicago Railway Company (P. 241, l. 19), * * * and all and all manner of real estate, or interest in real estate, wherever such real estate may be situate * * * which at the time of the entry of the decrees aforesaid was owned or possessed by said railway (P. 243, l. 23), * * * all estate, right, title and interest of said railroad or railway companies, and each of them, in and to any and all real estate * * *." (P. 243, l. 17.)

The purchasers conveyed to the plaintiff in error, by deed, containing the same description as that made by the special master. (P. 247.)

For the purpose of proving that the mortgagor company owned the property at the date of each of the several mortgages foreclosed, and therefore the lien attached by reason of it covering all property "then owned," and the after acquired clause was not material, the plaintiff in error proved payment of taxes, and also the descriptions by which the property was listed. (See evidence of James N. Hayworth, pp. 270 to 293.) Also the same, to some extent, by witness Petrie, (P. 302, l. 13 to 310). But upon defendants objection the court finally refused to hear evidence of continuous possession or payment of taxes. (P. 295, l. 27.)

This witness also testified that the depot was erected there before 1865 and had ever since been maintained.

The plaintiff in error also offered in evidence a plat made in 1862, upon which the property here in dispute is designated as "depot grounds," and the location of the railway buildings thereon is indicated, and their presence is recognized in the statement of the party making the plat.

This plat was excluded because it was not shown that the party who executed it owned the property, and for other reasons. (P. 60.)

It is claimed that this plat has been legalized, and was competent evidence without further verification. Also that it is valid, and with the admitted evidence of continued possession showed ownership before the date of either of the mortgages through which plaintiff in error claims.

Defendants in error introduced as their evidence all of the entries and files in an action by Patrick McGuire against said Louisville, New Albany & Chicago Railway Company, mortgagor, in which judgment was entered against it in September, 1896. This included an execution, upon which a part of the property here involved had been sold to M. M. Hathaway, defendant in error, and a subsequent deed by reason of this sale, conveying said part sold to him (pp. 315 to 391).

Defendants in error were also permitted to prove that the property covered by said sale was not used for railway purposes. This was over the objection of plaintiff in error (pp. 392, l. 21, and 393, l. 23).

In order to properly present the motion made by defendants in error, the partial print of the record should contain the following, which it does not contain:

> The decree of the Circuit Court of the United States, through which plaintiff in error claims, found at page 198; the report of sale by the special master, found at page 231; his deed to the purchasers, found at page 238; the deed of the purchasers to the plaintiff company, found at page 246; the deed of Brooks and wife to the mortgagor company, found at page 266; the evidence of witnesses Hayworth and Petrie, found at pages 295 and 270; the proceedings and sale through which defendants in error claim title, found at page 315 and pages following, and the evidence of witness Hathaway, found at page 392, and the certified copy of the plat of the Town of Francesville, together with its offer, and all proceedings with reference thereto, found at page 60.
>
> The references hereby made are to the places of beginning of the various items of evidence in the transcript on file in the Appellate Court of Indiana, to which both plaintiff and defendants in error have free access.

It was the contention of defendants in error that the mortgage did not cover, and therefore, the decree and sale did not convey to plaintiff in error the property in question, *because it was not used for railway purposes,* while plaintiff claims that it covered and conveyed *all property owned by the company at the date of the decree,* or before that day.

The Circuit Court of Indiana peremptorily instructed the jury trying the cause to find for the defendants in error. Plaintiff in error filed a proper motion for a new trial, alleging among other reasons, that the evidence did not sustain the verdict. This is the proper, and, in fact, the only way to present such a question for review under Indiana practice.

The Appellate Court of Indiana affirmed the action of the Circuit Court. The Appellate Court states the facts, as they appear from the evidence, with two exceptions. By a reading of this statement, in the opinion of the learned judge, speaking for that court, this court will see that the situation is as it has been before indicated in this brief. (See Partial Tr., pp. 10 to 12.)

The learned judge erred in stating that the property in question was acquired after the date of the several mortgages. The sole evidence was that the mortgagor company had been in possession since before 1865; had paid taxes since 1890, and a deed from one Brooks and wife made in 1896, but which referred to the plat of 1862 * * *, to which allusion has already made. As the record stands it does not appear just when the title was acquired, and if the plat, and other evidence, improperly excluded, had been admitted, it would have appeared that it has been owned by the company since before the date of either mortgage.

However, the greatest error into which the learned court fell, was after assuming that the property was "after acquired" that the clause set out in the opinion with reference to after acquired property was the *sole clause* in the various mortgages on this subject.

Without discussing the subject with reference to the other mortgages, the description in that of 1890, as embodied in the decree, is set out in part earlier in this brief. From this it appears that the clause upon which the court based its opinion is taken from the body of the specific description, when the granting or beginning clause, and declaration of intention at the conclusion, clearly cover *all property*, whether used for railway purposes or not, and whenever acquired. The error was in permitting this limited statement to control the other and more general ones.

That this error was harmful, and that it is rather the declaration of intention at the beginning and conclusion than the attempted particular description which is to govern, is shown by the opinion of this court in the case of *Alabama* v. *Montague*, 117 U. S., 602, 6 Sup. Rep., 611. There this court had to consider a mortgage containing an "all other property" clause. However, in that case, this general statement was found as a part of the specific description, just as the one relied on by the court is here, and, in announcing the true rule, says:

> "These words, which are found neither in the beginning of the granting clause as a general phrase to be afterwards emphasized by a more minute description, nor at the end, as a summary of what had preceded them, have their appropriate use in the precise place where they are found. * * *
>
> "*It is not to be denied that in a writing descriptive of property to be transferred or assigned, the more general words, which include all that is in-*

tended to be conveyed, are not to be fritted away by any attempt at a description of each particular thing fairly included in the more general language. But in such case it must be apparent that the intent was to include all that could be embraced within the more general terms. If, for instance, the description of the property mortgaged had commenced by saying 'all the property of the grantor, real, personal and mixed, in the states of Alabama, Georgia, Mississippi and Tennessee, and had then attempted to enumerate this property, but had omitted some of it, this omitted would have passed, as in *Spindle* v. *Sherce,* 111 U. S., 544."

In view of this principle, it is clear that the granting clause in the mortgage of 1890, showing that it was the intention to cover "all the present and in the future to be acquired railway system and property," and in the summary of the description, where it is declared, "it being intended, and hereby expressly covenanted, that the lien of this indenture shall embrace all * * * real and personal property * * * which the railway company now owns, or at any time hereafter may own," are to be held to include all property of the corporation, and are not to be limited by the attempt at a specific description in the other parts of the mortgage.

As enough of the record to consider the motion is not printed, it should be denied.

THE PLAINTIFF IN ERROR DID SPECIALLY SET UP AND CLAIM TITLE THROUGH THE DECREE OF THE UNITED STATES COURT, AND THE SALE AND OTHER PROCEEDINGS THEREUNDER, AND AS THE TITLE OF THE MORTGAGOR COMPANY WAS ADMITTED BY ALL PARTIES, THE COURT COULD NOT HAVE DECIDED IT WITHOUT DETERMINING WHETHER IT PASSED BY SAID DECREE.

We have already shown that each party claimed title through the mortgagor company. The plaintiff in error, through the decree and sale in the action to foreclose the mortgages, and the defendants in error through the judgment, and execution sale against the mortgagor company. In view of these claims the *sole question* to be decided was whether the title passed by force of the decree or the execution sale, and the court could not decide the case without deciding this question.

It is the settled law in Indiana that parties claiming title through a common grantor admit the source of title, and in an action to quiet title it is only necessary to trace title to the common source.

Taber v. *Railway*, 15 Ind., 459, 465.
McWhorter v. *Heltzell*, 124 Ind., 129, 131.
Wilson v. *Peellee*, Admr., 78 Ind., 384, 387.
Smith v. *Bryan*, 74 Ind., 515.
Start v. *Clegg*, 83 Ind., 78.

It has been repeatedly held by this court, that if it appears that the State Court *must have considered and decided the Federal question*, in order to have rendered the conclusion which it did, it is sufficient to give this court jurisdiction, although the fact that such a question was presented and decided was not mentioned in the opinion.

In speaking of the duty of the complaining party to

"specially set up and claim" the right, which is relied upon to invoke federal jurisdiction, this court, in the case of *Green Bay, etc.*, v. *Pattern Paper Co.*, 172 U. S., 58, 19 Sup. Rep., 97, 100, speaking by Justice SHIRAS, says:

> "But no particular form of words or phrases has ever been declared necessary in which the claim of federal rights must be asserted. *It is sufficient if it appears from the record that such rights were especially set up and claimed in the state court in such manner as to bring it to the attention of that court.*"
>
> "The true and rational rule, this court said, in *Bridge Proprietors* v. *Hoboken Co.*, 1 Wall., 143, 'is that the court must be able to see clearly, from the whole record, that a certain provision of the constitution or act of congress was relied on by the party who brings the writ of error, and that the right thus claimed by him was denied. In *Roby* v. *Colehour*, 146 U. S., 159, 13 Sup. Ct., 50, it was said that, 'our jurisdiction being invoked upon the ground that a right or immunity specially set up and claimed under the constitution or authority of the United States has been denied by the judgment sought to be reviewed, it must appear from the record of the case either that the right so set up was expressly denied, or that such was the necessary effect in law of the judgment.' *'If it appear from the record, by clear and necessary intendment, that the federal question must have been directly involved, so that the State Court could not have given judgment without deciding it, that will be sufficient.*"
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> *Chapman* v. *Goodnow*, 123 U. S., 540.
>
> *Powell* v. *Supervisors*, etc., 150 U. S., 440.

In the late case of *Kennedy Mining Co.* v. *Argonaut Mining Co.*, 189 U. S., 1, 23 Sup. Rep., 501, 503, this court held that a federal question was sufficiently set up to give jurisdiction, from the simple fact that the plaintiff in error asserted a title through a statute of the United States. The court, on page 503, speaking by Mr. Chief Justice FULLER, saying:

"Plaintiff in error contended in the courts below that, by force of Secs. 2 and 3 of the act of Congress of May 10, 1872, title to the ore in question passed to it through its patent to the Silva mine, and did not pass to the Pioneer through its patent, because the end lines of the latter were not parallel to each other."

"The defendant in error contended that its title was not acquired under the act of 1872, but under the act of July 26, 1866, which did not require parallelism of end lines."

"Under these circumstances it is held by a majority of the court that a Federal question was so presented that we have jurisdiction."

The cases of *Tullock* v. *Mulvane*, 184 U. S., 497, 22 Sup. Ct. Rep., 373, 375, and *Missouri, etc.*, v. *Elliott*, 184 U. S., 530, 22 Sup. Ct. Rep., 446, 448, strongly support the principle for which we are here contending.

We might multiply authorities along this line, but that is unnecessary. The opinion of the learned judge in Indiana shows that the *sole title asserted by plaintiff in error* was that given by the decree and sale in the United States Court. This was an assertion of a Federal right, just as in the case last cited, the assertion of title by force of an act of Congress, was the assertion of such a right.

To specially set up and claim a federal right, it is not necessary to assert in so many words that a federal right or authority is relied on. In fact, such a bare assertion would avail nothing. By this it is meant that it must be presented to the various tribunals in such a way as to properly place the question before them for decision, according to the local practice rules. Where, as here, the right or authority relied on, is disclosed by the evidence, and a motion for a new trial is necessary, and the only way to present the matter of whether the verdict and judgment is right on the evidence, then that is the only way by which the question could be presented.

Counsel seem to be laboring under the impression that somewhere in the proceedings it must be asserted that the right is a federal one, and it is relied upon as such.

If plaintiff had endeavored to present the question in any way than by the specific assignment in the motion for a new trial, the Appellate Court would have refused to consider it, because it was not properly presented to the trial court for review.

In the case of *Layton* v. *Missouri*, 187 U. S., 356, cited by counsel, this court refused to consider the appeal, because the highest court of the state refused to pass upon the federal question for the reason that it was not properly submitted to the trial court for review. Of necessity, this means that the question shall be presented to the trial court in such a way as that, according to the rules of practice there governing, that court is called upon to pass upon the federal question.

THE RECORD AFFIRMATIVELY SHOWS THAT THE APPELLATE COURT OF INDIANA DID CONSIDER AND DECIDE THE FEDERAL QUESTION HERE INVOLVED.

The learned judge of the Appellate Court, in stating the contentions of each of the parties, among other things says:

> "Both appellant and appellees claim title through the Louisville, New Albany and Chicago Railway Company. Appellant claims title through certain mortgages given by the Louisville, New Albany and Chicago Railway Company, which were foreclosed in the United States Circuit Court for the District of Indiana, and through which foreclosure and other conveyances following it, its title became vested."

The court then states that appellees claim title through a judgment, execution sale and deed against said mortgagor company. Continuing, the court says:

"It is contended by appellant that the real estate in controversy is a part of its depot grounds at Francesville, Indiana, and that the foreclosure and sale of the property of the Louisville, New Albany and Chicago Railway Company, through which foreclosure and sale appellant obtained whatever title it may have in the disputed premises, carried with it the title to said disputed premises. The judgment of McGuire against the Louisville, New Albany and Chicago Railway Company was obtained after the execution of the foreclosed mortgages through which appellant claims title. The contention of counsel for appellees is that the disputed property was not embraced within the mortgages and foreclosure, and that the same was not covered by the clause inserted in each mortgage intended to cover after acquired property, and, therefore, could not have been embraced within the foreclosure and sale under the proceedings in the United States Court. *An abstract question of law is, therefore, presented as to whether or not the property in dispute passed by the foreclosure and sale.*"

As there was no dispute whatever in the evidence, and the question was, therefore, an "abstract question of law," the trial judge in the Circuit Court held, that this real estate was not conveyed by the decree, and instructed the jury to find for the defendant. The Appellate Court proceeds to consider this action of the trial court, and holds, that upon the evidence, the action of the trial judge in so instructing the jury was proper. The court holds, that the undisputed evidence showed that the real estate in controversy was not used by the railway company for railway purposes. Then applying this undisputed fact to the mortgages, and the decrees based thereon, through which plaintiff in error claimed, that learned court held, that the description therein did not include the property here in controversy, and therefore appellant did not have title on account of such proceedings.

Perhaps the most conclusive answer to the contention of counsel is found in the case of *Missouri, etc.* v. *Elliott*, 184 U. S., 530, 22 Sup. Ct. Rep., 446, 448. In that case an action was brought in a State Court on an injunction bond given in connection with proceedings had in a court of the United States. The question in controversy was the items of expense to the successful litigant in the injunction case, which could be allowed in an action on the bond. It was claimed by plaintiff in error that the State Court erroneously allowed counsel fees in an action on the bond. Defendant in error urged that no federal right or question had been specially set up or claimed in the lower courts, and, therefore, denied the jurisdiction of this court. In deciding this question, this court, speaking by Mr. Justice WHITE, says:

> "We are at the outset met by an objection that there is no jurisdiction to review the judgment of the Kansas City Court of Appeals. It is contended on behalf of the defendant in error, that the Federal question relied upon was not raised below, and, therefore, is not reviewable here.
>
> "The general rule undoubtedly is that those Fedearl questions which are required to be specially set up and claimed must be so distinctly asserted below as to place it beyond question that the party bringing the case here from the State Court, intended to, and did assert such a Federal right in the State Court. But it is equally true that although the allegations of Federal right made in the State Court were so general and ambiguous in their character, that they would not in and of themselves necessitate the conclusion that a right of a Federal nature was brought to the attention of the State Court, yet, *if the State Court, in deciding the case, has actually considered and determined a Federal* question, although arising on ambiguous averments, *then a Federal controversy having been actually decided, the right of this court to review obtains.* * * *

*All that is essential that the Federal questions must be presented in the State Court in such a manner as to bring them to the attention of that tribunal. * * * And, of course, where it is shown by the record that the State Court considered and decided the Federal question, the purpose of the statute is subserved. And so controlling as to the existence of the Federal question is the fact that it was actually considered and decided by the State Court, that it has been held, although the general rule is that the raising of a Federal question in a petition for a rehearing is too late, yet, when the question is thus raised, and it is actually considered and decided by the State Court, the right to review exists."*

"Now, it plainly appears that the Kansas City Court of Appeals considered that there was presented to it for decision the question whether, in an action brought in a state court on an injunction bond given in a court of the United States, the state court was bound to apply to such a bond the rule prevailing in the courts of equity of the United States, viz.: that attorneys' fees are not a proper element of damage. We say this is undoubted, since the opinion of the Kansas City Court of Appeals recites that such was the contention, and the court proceeded to consider and decide it. That this contention involved a claim of immunity under an authority exercised under the United States, reviewable in this court, we have recently decided in *Tullock* v. *Mulvane,* 184 U. S., 497, *ante,* 657, 22 Sup. Ct. Rep., 372."

In the case last referred to the Supreme Court of Kansas held, that there was no federal question involved in the appeal; but this court held, that there was such a question, that it was actually decided by that court, and on this account this court had jurisdiction.

San Jose Land Co. v. *San Jose Ranch Co.,* 23 Sup. Rep., 487.

It is ordinarily held that the federal question must be set up or raised before a petition for a rehearing in the

court of last resort. But in the case of *Mallett* v. *North Carolina,* 181 U. S., 589, 21 Sup. Ct. Rep., 730, 731, this court, speaking by Mr. Justice Shiras held, that as the federal question raised on a petition for a rehearing was then considered and decided, it was sufficient to bring the case before this court for review.

As the Indiana court found in the record, "An abstract question of law, * * * as to whether or not the property in dispute passed by the foreclosure and sale"; and this abstract question of law was the sole one it considered and decided, it is clear that it did pass upon the federal question, that is, the "due effect" of said decree and sale, and this court can, therefore, review this decision to see whether the true and proper scope of the decree was limited or denied.

THE QUESTION OF WHETHER THE PLAINTIFF IN ERROR HAD TITLE TO THE DISPUTED PREMISES TURNED ON THE EFFECT OF THE DECREE OF THE UNITED STATES CIRCUIT COURT; UNDER SUCH CIRCUMSTANCES THIS COURT HAS JURISDICTION TO DETERMINE WHETHER DUE EFFECT WAS DENIED SUCH DECREE BY THE CONCLUSION OF THE STATE COURT THAT IT DID NOT EMBRACE THE PROPERTY HERE IN CONTROVERSY.

In his argument, counsel for defendant in error seems to concede that this court would have jurisdiction, if the federal right had been specially set up and claimed in the Indiana courts. However, in anticipation that such an inference is not intended, we will refer in a general way to a number of the decided cases, which we believe establish this proposition.

In the case of *Dupasseur* v. *Roshereau,* 21 Wallace 130, the plaintiff in error was claiming title to a piece of

real estate through a sale on execution by the United States marshal, to satisfy a judgment entered in the United States Court. The defendant in error was claiming title through a mortgage executed by the judgment defendant, with a decree in a State Court of Louisiana, and deed resulting from a foreclosure and sale thereunder.

The Supreme Court of Louisiana held, that the title of the defendant in error was good, and that of plaintiff in error was not. In holding that it had jurisdiction to review this proceeding on writ of error to the Snpreme Court of Louisiana, this court, on page 134, says:

> "Where a State Court refuses *to give effect to a judgment of a court of the United States,* rendered upon the point in dispute, and with jurisdiction of the case and parties, a question is undoubtedly raised, which, under the act of 1867, may be brought to this court for revision. *The case would be one in which a title or right is claimed under an authority exercised under the United States,* and the decision is against the title or right so set up. It would thus be a case arising under the laws of the United States, establishing the Circuit Court and vesting it with jurisdiction; and hence, it would be within the judicial power of the United States, as defined by the Constitution; and it is clearly within the chart of appellate power given to this court, over cases arising in and decided by the State Courts."
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> * * * * *
>
> "* * * whether the validity or due effect of a judgment of the State Court, or that of a judgment of a United States court is disallowed by a State Court, the Constitution and laws furnish redress by final appeal to this court.
>
> "We cannot hesitate, therefore, as to our jurisdiction to hear the case."

In the case of *Central Natl. Bank* v. *Stevens,* 169 U. S., 432, this court had to consider a case where the Court

of Appeals of the State of New York had enjoined the beneficiaries under a decree entered in a court of the United States, from proceeding thereunder. This court held, that it had jurisdiction to entertain such appeal, among other things, on page 460, saying:

> "Whether due effect has been given by a State Court to a judgment or decree of a court of the United States is a federal question within the jurisdiction of this court, or a writ of error to the Supreme Court of the state."

In the late case of *Pardee et al.* v. *Aldridge,* 189 U. S., 429, 23 Sup. Rep., 514, this court had to consider the exact question of jurisdiction which this case presents. In that case plaintiffs in error claimed to be the owners of certain real estate through decrees of the Circuit Court of the United States, entered in the foreclosure of certain mortgages executed by the Texas Trunk Railroad Company. The mortgage in that case differed from those in the case at bar, in, that it limited the lien to "property *used* for and *pertaining to* the operation of said railroad." The description of the property covered by the decree was general, just as it is here, including "all appendages and appurtenances of said railroad, and the property of said railroad company then acquired or which might be thereafter acquired in the State of Texas, used for and pertaining to the operation of said railroad." (See record in that case, page 153.)

The property in controversy was certain acreage property in the City of Dallas, Texas. The plaintiff in error claiming that it came within the limitations of the mortgage, and the decree of the United States Court, which was in the language of the mortgage; the defendant in error claiming that it was not property "used for or pertaining to the operation of said railroad."

In holding that there was jurisdiction, this court, on page 515, says:

> "The case is brought here by writ of error on the ground that due effect was denied to decrees of the United States court. *Dupassuer* v. *Rochereau*, 21 Wall., 130, 22 L., Ed. 588. See *Sweringen* v. *St. Louis*, 185 U. S., 38, 41; 46 L., Ed. 795, 797; 22 Sup. Ct. Rep., 569. As we are of opinion that the judgment of the Court of Appeals was right, it is less important than otherwise it would be to discuss *the grounds upon which we think that there is jurisdiction*, and we shall proceed at once to the merits of the case."

This question has been repeatedly before this court, and in each instance it has been held that there was jurisdiction.

Embry v. *Palmer*, 107 U. S., 3.

Crescent Live Stock Co. v. *Butchers Union*, 120 U. S., 141, 146.

National Foundary & Pipe Wks. v. *Oconto Water Co.*, 183 U. S., 216; 22 Sup. Ct. Rep., 111, 118.

Pittsburgh, etc., Ry. v. *Long Island, etc., Co.*, 172 U. S., 493, 507; 19 Sup. Rep., 238, 244.

Jacobs v. *Marks*, 182 U. S., 583, 587; 21 Sup. Rep., 865.

THE FACT THAT THE FEDERAL QUESTION ARISES ON THE EVIDENCE IS NO OBJECTION TO THE JURISDICTION OF THIS COURT; AND THIS IS ESPECIALLY TRUE, WHERE, AS HERE, THE JURY WAS PRE-EMPTORILY INSTRUCTED TO FIND AGAINST THE FEDERAL RIGHT, AND THE QUESTION PRESENTED IS AN ABSTRACT ONE OF LAW.

We are aware of the rule that this court will not consider the evidence for the purpose of determining the proven facts, where there is a conflict; but this rule has no application in such a case as this. In this case the court will look to the evidence for the purpose of determining whether, in point of law, the judgment against the federal right can stand.

If the rule were otherwise, litigants would often be deprived of their rights; for there is no way to prevent a trial judge from instructing a jury to find one way or another, and upon such an instruction the only way to determine whether there was error is by considering the evidence.

The rule governing in such cases has often been announced by this court.

In indicating the different ways in which a federal question could be specially set up in the case of *Tullock* v. *Mulvane*, 184 U. S., 497, 22 Sup. Ct. Rep., 373, 374, this court, speaking by Mr. Justice WHITE, says:

> "It is urged by the defendant in error that these contentions involve no federal question, and that if they do they were not sufficiently set up in the lower courts, and, therefore, this court has no jurisdiction to review them. We dispose at once of the contention that if the propositions involve federal questions they were not duly raised below, by referring to the statement which we have made of the case, whereby it appears that the contentions were raised below,

by the pleadings, *by the objections to evidence,* and by the request for instructions, and, indeed, as so raised were expressly considered and directly passed upon by both the trial court and the Supreme Court of the State of Kansas, which latter fact, in and of itself suffices to present the federal question, even if it had been otherwise ambiguously raised on the record, which is not the case."

This question was considered by this court in the case of *Lehnen* v. *Dickson,* 148 U. S., 71, 13 Sup. Ct. Rep., 481, 482, this court, there speaking by Mr. Justice BREWER, says:

> "It is true, if there be an agreed statement of facts submitted to the trial court, and upon which its judgment is founded, such agreed statement will be taken as the equivalent of a special finding of facts. *Supervisors* v. *Kennicott,* 103 U. S., 554. Doubtless, also, cases may arise in which, without a formal special finding of facts there is presented a ruling of the court, *which is distinctly a ruling upon a matter of law,* and in no manner a determination of facts, or of inferences from facts, in which this court ought to, and will, review the ruling."

In the case of *City of St. Louis* v. *Western Union Telegraph Company,* 148 U. S., 92, 13 Sup. Ct. Rep., 485, this court had to consider an action by the City of St. Louis against the Telegraph Company for the amount of a license tax of $5 per pole which tha city had by ordinance imposed upon said company. At the close of the evidence the city made a motion that the court enter judgment in its favor for the amount shown to be due. In holding that whether this motion should have been granted or not presented a question for review, the court speaking by Mr. Justice BREWER, on page 487, saying:

> "At the threshold of the case we are met with the objection that there are no special findings of fact, and that, therefore, our inquiry is limited to ques-

> tions arising upon the pleadings, or upon rulings made by the court during the progress of the trial. * * *
>
> "It is enough to say that in this case there was, as appears by the bill of exceptions, an application at the close of the trial for a declaration of law, that the plaintiff was entitled to judgment for the sum claimed, which instruction was refused and exception taken; and this, as was held in *Norris* v. *Jackson*, 9 Wallace, 125, presents a question of law for our consideration."

In *Lancaster* v. *Collins*, 115 U. S., 222, 225, 6 Sup. Ct. Rep., 33, 34, this court held, that it would look at the evidence for the purpose of determining whether a motion for a judgment by one of the parties should have been sustained. The court, speaking by Mr. Justice BLATCHFORD, saying:

> "This court cannot review the weight of evidence, and can look into it only to see whether there was error in not directing a verdict for the plaintiff on the question of variance, or because there was no evidence to sustain the verdict rendered."

In the case of *Martin* v. *Hunter's Lessees*, 1 Wheaton, 304, there was in controversy the title to a certain tract of land. The case was brought to this court upon the ground that the construction of a treaty by the Court of Appeals of Virginia was involved. It was urged that this court could not inquire into the title, but could only determine the correctness of the construction put upon the treaty, by said court, and that the judgment of said court would not be reviewed here, unless it appeared that a construction had been put upon the treaty. This court denied this position, on pages 357, 458, saying:

> "If this be the true construction of the section, it will be wholly inadequate for the purposes which it professes to have in view, and may be evaded at pleasure. But we see no reason for adopting this

narrow construction; and there are the strongest reasons against it, founded upon the words, as well as the intent of the legislature. What is the case for which the body of the section provides a remedy by writ of error? The answer must be in the words of the section, a suit where is drawn in question the construction of a treaty, and the decision is against the title set up by the party. It is, therefore, the decision against the title set up with reference to the treaty, and not the mere abstract construction of the treaty itself, upon which the statute intends to found the appellate jurisdiction. How, indeed, can it be possible to decide whether a title be within the protection of a treaty, until it is ascertained what the title is, and whether it have a legal validity? *From the very necessity of the case, there must be a preliminary inquiry into the existence and structure of the title, before the court can construe the treaty in reference to that title. If the court below should decide that the title was bad, and, therefore, not protected by the treaty, must not this court have a power to decide the title to be good, and, therefore, protected by the treaty?* Is not the treaty, in both instances, equally construed, and the title of the party in reference to the treaty, equally ascertained and decided? Nor does the clause relied on in the objection impugn this construction. It requires, that the error upon which the Appellate Court is to decide, shall appear on the face of the record, and immediately respect the questions before mentioned in the section. One of the questions is as to the construction of a treaty upon a title specially set up by a party, and every error that immediately respects that question must, of course, be within the cognizance of the court. *The title set up in this case is apparent upon the face of the record, and immediately respects the decision of that question; any error, therefore, in respect to that title must be reexaminable, or the case could never be presented to the court."*

In *Cunningham* v. *Ashley*, 14 How., 377, an action was brought to this court on writ of error to the Supreme

Court of Arkansas, the defendants claimed the legal title to the property in controversy, while the complainant claimed that he had a paramount equitable title thereto. This court examined all of the facts in the case with relation to their bearing upon the title of the parties, and at page 389, said:

> "The facts in the case are exceedingly voluminous and complicated, but we have considered them, and the legal and equitable bearing they have upon the title of the parties. Upon this view, we are brought to the conclusion that the entries on which the defendants' patents were issued, were void, so far as they interfere with the claim of the complainant, for the reasons stated, and that, consequently, the patents are also void."

The decree of the Supreme Court of Arkansas was reversed.

Hyde v. *Booraem*, 16 Peters, 169, was an action for the possession of notes, which had been executed and deposited for delivery to the plaintiff on certain conditions. The proceedings in the court below were in accordance with the practice of Louisiana, where the suit originated, and upon writ of error from this court all of the evidence was sent up with the record. This court there called attention to the fact that it was without authority to review the rulings upon questions of fact, but it did consider the evidence, the reason therefor being given by Justice Story, on page 176, in these words:

> "Taking this case, then, as that was taken, to be one where there is no conflict of evidence, and all of the facts are admitted to stand on the record, without any controversy as to their force and bearing in the nature of a statement of facts, and looking to the allegations and prayer of the petition, and the facts stated by the judge, the question which we are to dispose of is, whether, in point of law, upon these facts, the judgment can be maintained."

The court then reviewed the facts, and concluded that the judgment of the court below was wrong, and reversed it.

In *Dower* v. *Richards,* 151 U. S., 658, Justice Gray, in an exhaustive opinion, says:

> "When, indeed, the question decided by the state court is not merely of the weight or sufficiency of the evidence to prove a fact, but the competency and legal effect of evidence as bearing upon a question of federal law, the decision may be reviewed by this court."

In the late case of *Pardee* v. *Aldridge, supra,* this court, considering a case in many respects similar to this one, did consider the evidence; not for the purpose of reviewing any conclusions of the lower court on disputed questions of fact, for there were none, but, as said by Justice Story, *supra,* for the purpose of determining *"whether in point of law, upon these facts, the judgment can be maintained."*

As it appears to us, as the Circuit determined that there was but a naked question of law presented, and this view was concurred in by the court from which this appeal is taken, the cause is before this court for the purpose of determining whether upon these undisputed facts the judgment can be sustained.

As is said by the Appellate Court of Indiana, in its decision of this case:

> "An abstract question of law is therefore presented, as to whether or not the property in dispute passed by the foreclosure and sale."
>
> *C. I. & L. Ry.* v. *McGuire et al.,* 65 N. E., 932, 933.

In the case of *American Paper Bag Co.* v. *Van Nortwick,* 52 Fed., 752,

> "Upon the hearing in the court below, at the conclusion of plaintiff's case, no counter evidence being offered, defendants moved the court to strike out and exclude all evidence as not tending to sustain the issue on the part of the plaintiff. The court sustained the motion to which ruling the defendant duly excepted." (P. 753.)

The Circuit Court of Appeals, in holding that it could review the evidence on page 753, says:

> "This ruling and exception authorize the review of the evidence so far as essential to the question whether the facts proven made a *prima facie* case, sufficient, in the absence of counter evidence, to justify a recovery by the plaintiff."
>
> *Goulding* v. *Hammond,* 54 Fed., 639.

The situation where defendant offers no evidence, and where it does, but it raises no issue with that of the plaintiff, there is no conflict, are identical, and in each case the court will look at the evidence for the purpose indicated.

THE APPEAL IS PROPERLY PERFECTED FROM THE APPELLATE COURT.

As the Supreme Court of Indiana refused the petition of plaintiff in error to transfer this cause to it for revision and reversal of the decision of the Appellate Court, this appeal is properly here on writ of error to the said Appellate Court.

Missouri, etc., v. *Elliott,* 184 U. S., 530; 46 L. Ed., 673.

Rothschild v. *Knight,* 184 U. S., 334; 46 L. Ed., 573.

AUTHORITIES OF DEFENDANTS IN ERROR.

In the case of *Oxley Stove Co.* v. *Butler County,* 166 U. S., 648, it was held that a general allegation that a decree was void because it was passed against some persons who were dead, and others who had no notice, was not sufficient as a charge that it was in violation of the fourteenth amendment, providing that no person shall be deprived of his property without due process of law. It did not appear that any reference was made to the United States constitution, or that the plaintiff in error relied on it at any time. The state court did not consider or decide the question in the light of this constitution, and it was, therefore, held that the federal right was not "specially set up and claimed" as required.

However, the court did hold in that case that if the state court had passed upon the federal question there would be jurisdiction. (Page 660.)

In the case of *Columbia Water Power Co.* v. *Columbia Electric, etc., Co.,* 172 U. S., 475, the question involved was the validity of a statute, and this court held that that clause requiring the right to be specially set up and claimed did not apply to such a case. In the discussion the court announces the general principle governing where a right is claimed, where it must be specially set up and claimed.

In the case of *Jacobi* v. *Alabama,* 187 U. S., 133, defendant objected to the admission of the former evidence of a witness, at a second trial, claiming that under the constitution he was entitled to be confronted by the witness. That he referred to the constitution of the United States was not pretended, and the state court, in deciding the case, did not consider the urged federal question.

In the case of *Layton* v. *Missouri,* 187 U. S., 356, the state court refused to consider the alleged federal question because it was not properly presented. This court there said that it could not review the judgments of state courts where such courts "did nothing more than decline to pass upon the federal question because not raised in the trial court, as required by the state practice."

These cases are not within gunshot of the point here involved; but the last one does sustain our early contention, that when a federal question is presented according to the rules of local practice, so that, according to such rules, the local court is called upon to pass upon it, it is properly presented. In such cases it is not necessary to assert in a pleading, motion for a new trial or assignment of errors, that a federal right is asserted or relied on. If the evidence shows that the right claimed is a federal one, and if the record presents for review the question of whether a verdict and judgment against that right were proper, then it is "specially set up and claimed," and a holding against it is subject to review.

In neither of the cases cited by counsel did it appear that any federal right was mentioned or claimed at any time until this court was reached. While in the case at bar, the only title asserted by the plaintiff in error was that which it had through a decree and sale in a United States court, and that, of itself, makes the case one where "a title or right is claimed under an authority exercised under the United States."

Dupassner v. *Roshereau, supra.*

THE JUDGMENT SHOULD NOT BE AFFIRMED.

Defendants in error have urged as a single reason why the cause should be dismissed or affirmed, that the court does not have jurisdiction. But we are conscious of the fact that the prayer for affirmance would justify a ruling in their favor if the principles upon which the appeal would have to succeed have been decided adverse to plaintiff in error by this court; or if they are so preposterous as to show that the only purpose of the appeal is to delay defendants in the enjoyment of their rights. We therefore suggest some of the principles and authorities upon which we do rely, to show, not only that there is merit in the appeal, but that it ought to succeed, leaving for our brief on the merits a more elaborate discussion of these and other principles involved.

I.

In Indiana, since 1852, railway companies have been authorized to acquire any property needed for the purposes of the road, and also to receive as a donation, or in payment for stock, any real estate wherever situate.

Right of Way, Burns R. S., 1901, Sec. 5153.
Other purposes, Burns R. S., 1901, Sec. 5153.
For stock, Burns R. S., 1901, Sec. 5151.
Donation, Burns R. S., 1901, Sec. 5150.

II.

"The property in question *was properly acquired* by the Louisville, New Albany and Chicago Railway Company."

C. I. & L. v. *McGuire,* partial record, p. 13.

III.

As each party to this litigation claims title through the mortgagor company, neither can be heard to say that the property was not lawfully acquired by said company.

Taber v. *Railway,* 15 Ind., 459.

IV.

The mortgagor company was authorized to mortgage not only its railway system, but all of its other property, whether held at the date of the mortgage or afterwards acquired.

Burns Ind. R. S., 1901, Sec. 5212.

V.

The mortgages upon which the title of plaintiff in error is based, and especially that of 1890, was sufficient to include that here in controversy, whether used for railway purposes or not, and by the decree and sale it was vested in plaintiff.

Wilson v. *Boyce,* 2 Otto, 320; 23 L. Ed., 608.
Alabama v. *Montague,* 117 U. S., 602.
Short on Railway Bonds, Sec. 197.
Beach on Railways, Sec. 616.
Robinson v. *Railway,* 66 Pa. St., 160.
Cooper v. *Wolfe,* 15 Oh. St., 523, 530.

VI.

The plaintiff in error offered in evidence a plat of the Town of Francesville, showing the dedication of this property to the railway in 1862. This was excluded, because the one who executed it did so as "proprietor" and not as owner, and there was no evidence to show that he did own the dedicated property. All such plats have been legalized, and it was proper evidence. If admitted it would have been made to appear that this property was owned by the mortgagor at the date of each of the several mortgages, and passed as security under that part of the description covering all property then owned.

Burns R. S., 1901, Sec. 4238a.

Burns R. S., 1901, Secs. 4412, 4415.

CONCLUSION.

For the many reasons given there is jurisdiction, and the motion should be denied.

Respectfully submitted.

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OCTOBER, 1903.